

APPEAL NO. 052519
FILED JANUARY 11, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 22, 2005, with the record closing on October 5, 2005. The hearing officer resolved the disputed issues by deciding that the date of maximum medical improvement (MMI) is August 18, 2005, and that the correct impairment rating (IR) is 10% as assessed by the second designated doctor. The appellant (carrier) appealed, arguing that it was an abuse of discretion for the hearing officer to appoint a second designated doctor following the CCH and further that the second designated doctor's opinion on MMI and IR is against the great weight of the other medical evidence. The respondent (claimant) responded, contending that it was appropriate to appoint the second designated doctor and that the first designated doctor's certification of MMI and IR were against the great weight of the other medical evidence.

DECISION

Reversed and rendered.

The parties stipulated that the claimant sustained a compensable injury on _____. It was undisputed that the nature of the claimant's compensable injury was to his low back. At issue was the MMI and IR of the claimant's compensable _____, injury. Two certifications were in evidence. The claimant was examined by the Texas Department of Insurance, Division of Workers' Compensation (Division)-selected designated doctor on September 2, 2004. The designated doctor certified that the claimant attained MMI on September 2, 2004, with a 0% IR, placing the claimant in Lumbosacral Diagnosis-Related Estimate (DRE) Category I of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). The claimant's treating doctor subsequently certified that the claimant reached MMI on December 28, 2004, with a 10% IR, placing the claimant in Lumbosacral DRE Category III of the AMA Guides.

The hearing officer correctly noted, citing Appeals Panel Decision (APD) 030091-s, decided March 5, 2003, that the treating doctor's certification was not performed in accordance with the AMA Guides because he placed the claimant in Lumbosacral DRE Category III, radiculopathy, based solely upon the electrodiagnostic studies without identifying any loss of relevant reflexes or atrophy upon clinical examination. The hearing officer went on to note that the designated doctor failed to conduct his impairment evaluation in accordance with the AMA Guides because he refused to consider claimant's muscle guarding/spasm and nonverifiable radicular complaints in assigning an IR. We disagree.

The hearing officer held the record open to obtain clarification from the designated doctor. In a letter of clarification sent by the hearing officer after the conclusion of the CCH, the designated doctor was asked to explain why the claimant is not entitled to an IR of 5% under DRE Category II considering his MRI testing which revealed a disc herniation impinging upon the subarachnoid space at L4-L5 and nonverifiable radicular complaints following the injury on _____. The designated doctor responded in correspondence dated April 13, 2005, and explained that the claimant complained that his leg would go numb down to his knee which implied that the entire leg goes numb. The designated doctor described that as a stocking type glove distribution which does not follow an anatomical pathway. The designated doctor then pointed out that according to Table 71 of the AMA Guides radicular complaints that follow anatomic pathways but cannot be verified by neurologic findings belong with the guarding differentiator. The designated doctor noted that the results of his testing and physical examination of the claimant only met the criteria for DRE Category I and declined to change the IR of 0% he previously assessed.

The hearing officer found that the designated doctor refused to consider the pathologies revealed by the claimant's imaging and electrodiagnostic studies and that his evaluation was not performed in accordance with the AMA Guides. The hearing officer noted that the designated doctor refused to consider the claimant's muscle guarding/spasm and nonverifiable radicular complaints in assigning an IR.

The designated doctor in his initial certification of the claimant's MMI and IR noted that a diagnosis of muscle spasm and lumbar radiculitis had been listed in the claimant's medical records in addition to other diagnoses. He also specifically listed the MRI and noted the results as well as a medical record which showed a herniated disc by MRI, and radiculopathy at L5 bilaterally per nerve conduction velocity/ectromyogram.

On page 3/102 of the AMA Guides, DRE Lumbosacral Category I: Complaints or symptoms has as its description and verification:

Description and Verification: The patient has no significant clinical findings, no muscle guarding or history of guarding, no documentable neurologic impairment, no significant loss of structural integrity on lateral flexion and extension roentgenograms, and no indication of impairment related to injury or illness.

On page 3/102 of the AMA Guides DRE Lumbosacral Category II: Minor Impairment has as its description and verification:

Description and Verification: The clinical history and examination findings are compatible with a specific injury or illness. The findings may include significant intermittent or continuous muscle guarding that has been observed and documented by a physician, nonuniform loss of range of motion, or nonverifiable radicular complaints. There is *no* objective sign of radiculopathy and *no* loss of structural integrity.

In his response to the hearing officer's letter of clarification, the designated doctor explained why he did not place the claimant in DRE Category II based on the guarding referenced in the medical records. The hearing officer's finding that in certifying MMI and assignment impairment, the designated doctor refused to consider the pathologies revealed by claimant's imaging and electrodiagnostic studies is in error. The reports of the designated doctor specifically mention the reports and the designated doctor gave a clear explanation as to why he placed the claimant in Lumbosacral DRE Category I.

In APD 011607, decided August 28, 2001, the Appeals Panel held that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Division for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. In APD 002043, decided October 6, 2000, the Division was found to have abused its discretion when it appointed a second designated doctor because, when it appointed him, it had not established that the first designated doctor would either be completely unavailable or unreasonably delayed in his ability to reexamine the claimant. If a designated doctor cannot or refuses to comply with the requirements of the 1989 Act, a second designated doctor may be appointed. APD 961436, decided September 5, 1996. The instant case is distinguishable from APD 033012, decided December 23, 2003. In APD 033012, *supra*, the designated doctor stated specifically that he did not believe that the bulge or herniation are due to the compensable injury. In the instant case it is clear that the designated doctor considered the diagnostic tests and examined the claimant in determining the impairment to be assigned for the claimant's entire compensable injury. As previously noted, the certification of MMI and IR by the treating doctor could not be adopted because he placed the claimant in Lumbosacral DRE Category III based solely upon the electrodiagnostic studies showing nerve root irritation and without identifying any loss of relevant reflexes or atrophy upon clinical examination. However, the hearing officer's finding that the designated doctor's IR evaluation was not performed in accordance with the AMA Guides is in error. The designated doctor specifically detailed his findings upon examination of the claimant and acknowledged review of the medical records sent to him. The evidence reflects that he responded to every letter of clarification and explained his reasons for assessing impairment with supporting reasons provided in the AMA Guides. It was improper for the hearing officer to appoint a second designated doctor in this case.

We reverse the hearing officer's determination that the date of MMI is August 18, 2005, and that the correct IR is 10% and render a new decision that the date of MMI is September 2, 2004, and that the correct IR is 0%.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY, A DIVISION OF ZURICH NORTH AMERICA** and the name and address of its registered agent for service of process is

**LEO MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge